No. 13,145

In the United States Court of Appeals for the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

CECIL A. MILLER, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISIONS OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE PETITIONER

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OPINION BELOW

The Tax Court's findings and opinion (R. 100-111) are reported at 16 T.C. 1010.

JURISDICTION

The petition for review (R. 113-116) involves deficiences in federal income taxes determined by the Commissioner against the taxpayer, Cecil A. (Anabel) Miller, for the taxable years 1945 and 1946. On February 28, 1949, the Commissioner mailed the taxpayer a notice of deficiency in such taxes for the taxable year 1945 in the amount of $1,207 (R. 5-6), and on July 13,

1949, the Commissioner mailed the taxpayer a notice of deficiency in such taxes for the year 1946 in the amount of $995.60 (R. 11-12). Within 90 days after February 28, 1949, and on May 24, 1949, the taxpayer filed a petition with the Tax Court of the United States for a redetermination of the deficiency for the taxable year 1945 (R. 3-7), and within 90 days after July 13, 1949, and on August 10, 1949, the taxpayer filed a petition with the Tax Court for a redetermination of the deficiency for the taxable year 1946 (R. 8-12), under Section 272 (a)(1) of the Internal Revenue Code. The decisions of the Tax Court that there are no deficiencies for the taxable years 1945 and 1946, were entered May 16, 1951. (R. 112, 113.) The two proceedings were consolidated for trial (R. 15), and are brought to this Court by a single petition for review, filed August 6, 1951 (R. 113-116), under the provisions of Section 1141(a) of the Internal Revenue Code, as amended by Section 36 of the Act of June 25, 1948.

QUESTION PRESENTED

The taxpayer was divorced from her husband in an action for divorce instituted by the taxpayer against her husband on June 23, 1937, pursuant to a final decree of divorce entered on August 25, 1938. Periodic payments were received by her from her husband in the taxable years 1945 and 1946 in discharge of a legal obligation which, because of such relationship was incurred by him under a written instrument, denominated a property settlement agreement, entered into by them on June 15, 1937. The question is whether

such agreement was a written instrument "incident to such divorce," with the result that the payments made thereunder after the final decree of divorce was entered were includible in the taxpayer's gross income under Section 22(k) of the Internal Revenue Code.

STATUTE AND REGULATIONS INVOLVED

These are set out in the Appendix, *infra.*

STATEMENT

So far as material here, the Tax Court found the facts as follows (R. 101-111):

The taxpayer's first husband, by whom she had one son, born in 1911, died in 1913. In 1921 she married Jared H. Miller, who was 20 years her senior, and lived with him for about 15 years. They resided at Fontana, California. (R. 101.)

In March 1936, the taxpayer discovered that Miller was being intimate with another woman. He confessed and at first they agreed to try to continue to live together and to forget the other woman. (R. 101.)

Miller had inherited some mining property from his fourth wife. He left Fontana on July 24, 1936, to visit his mining property in Michigan, intending to return in September 1936, but wrote the taxpayer late in September that he did not intend to return, advising her to seek the advice of a lawyer in order to obtain a property settlement. The taxpayer wrote Miller in an effort to persuade him to return, but received no other letter from him and thereafter they communicated with each other only through attorneys. (R. 101-102.)

In October 1936, the taxpayer sought the advice of an attorney, telling him that she did not want a divorce but only a property settlement. In March, 1937, the taxpayer's attorney and the attorney for Miller had agreed upon all of the terms of the settlement. (R. 102.)

Late in April, 1937, the taxpayer decided to seek a divorce, and her attorney then told the attorney representing Miller of her change of mind. The latter passed on the news to Miller late in April, 1937. (R. 103.)

All of the terms of the property settlement had been agreed upon and the written instrument of settlement, with complete schedules, of the property which each was to receive, attached, had been drawn up by the latter part of May, 1937, but the attorneys for the two spouses learned that Miller intended to come to Los Angeles in the then near future and decided to have the agreement signed when he got there.[1] (R. 103.)

The agreement provided, among other things, that Miller was to pay the taxpayer $6,300 a year as long as she lived, in quarterly installments, provision being made for the payment of that amount in such installments by his estate if he predeceased her. (R. 104.)

A paragraph in the agreement was as follows (R. 104):

> This agreement shall not alter the relations of the parties hereto except with regard to their property rights; provided, however, that in the event that either party hereto shall obtain a divorce

[1] The agreement recited that it was entered into on June 15, 1937, and it was signed that day. (R. 103.)

> from the other, this agreement may be submitted to the court in which said divorce is obtained for approval.

The agreement made no provision, other than the above-quoted paragraph, referring to such a divorce, and no suggestion was ever made to the taxpayer, or her attorney, that the property settlement agreement was contingent in any way upon her obtaining a divorce. There was no understanding between the taxpayer and her husband at the time they entered into the property settlement agreement that it was contingent upon her obtaining a divorce. (R. 104.)

On the advice of her attorney, the taxpayer filed a complaint for a divorce in the Superior Court of California on June 23, 1937.[2] (R. 105.)

Miller was served with a summons, but did not contest the divorce, and an interlocutory decree of divorce was entered by default on August 24, 1937. This decree recited that the property agreement of June 15, 1937, was "approved."[3] (R. 105.)

A final judgment of divorce was entered on August 25, 1938, on a printed form on which only the names and dates had been typed.[4] The words printed on that form included the following (R. 105):

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[2] The complaint is Exhibit 3. (R. 51-56.) It is stated in paragraph IV thereof that taxpayer and her husband had entered into a property settlement agreement for the care and maintenance of the taxpayer during the rest of her natural life and that such agreement was acceptable to her and would be submitted to the court on the hearing of the action for its approval. Accordingly, the plaintiff prayed not only for the severance of the bonds of matrimony, but that the agreement be ratified and approved. (R. 55.)

[3] The interlocutory decree of divorce is Exhibit 4. (R. 57-58.)

[4] The final judgment of divorce is Exhibit 5. (R. 58-59.)

> That wherein said interlocutory decree relates to the property of the parties hereto, said property be and the same is hereby assigned in accordance with the terms thereof to the parties declared therein to be entitled thereto.

On April 19, 1938, the taxpayer and Miller entered into a supplemental agreement wherein the residence property at Fontana, in which she had been given a life estate by the original agreement, was conveyed to her absolutely, and certain other personal property was surrendered to her by Miller. Otherwise the terms of the original agreement were to remain in full force and effect. The supplemental agreement was not shown to the court in the divorce proceeding.[5] (R. 105.)

The taxpayer reported as her only income for 1945 and 1946 the annual payments of $6,300 received from Miller under the agreement of June 15, 1937, but reported no tax due thereon, claiming that this amount was not taxable to her under Section 22(k) of the Internal Revenue Code. The Commissioner held that the amounts were taxable to her under that section and accordingly determined the deficiencies in question. (R. 106.)

The Tax Court held that the phrase "incident to" as used in Section 22(k) required that "a divorce must be part of an integral plan of the two spouses which included the obtaining of a divorce" (R. 107), and that (R. 111)—

> In short, the property agreement in this case was not a part of an integral plan, which plan included

[5] The supplemental property agreement was admitted in evidence as Exhibit 2. (R. 44-50.)

an honest attempt on the part of the petitioner to obtain a divorce. It was not a part of the package of the divorce which was later obtained.

STATEMENT OF POINTS TO BE URGED

The Tax Court erred:

(1) In holding that Section 22(k) required that, in order for the agreement therein mentioned to be "incident" to the divorce, it must be a part of an integral plan of the spouses which included the obtaining of the divorce.

(2) In holding that the evidence did not establish that the agreement in question was incident to the divorce which the taxpayer thereafter obtained from her husband.

SUMMARY OF ARGUMENT

The Commissioner contends that the Tax Court erred in holding the so-called property settlement agreement, which the taxpayer and her husband entered into on June 15, 1937, was not "incident" to the divorce she thereafter obtained from him, within the meaning of Section 22(k) of the Internal Revenue Code. The Commissioner's contention is twofold: First, that the Tax Court misconstrued the section in holding that, for the agreement to be incident to the divorce, it must have been a part of an integral plan of the spouses which included the obtaining of a divorce. Second, the finding of the Tax Court that the agreement was not incident to the divorce is clearly erroneous (1) under the Commissioner's interpretation of the statute, and (2) even under the Tax Court's interpretation thereof. We discuss these contentions in the order stated under our Subpoints A and B.

A. The sole question in this case is whether the agreement was incident to the divorce, within the meaning of Section 22(k). The signal error of the Tax Court in holding that the agreement was not lies in the fact that it regarded the section as requiring that a divorce be anticipated, or contemplated, or mutually understood, or agreed to, and this before the financial terms of the agreement had been settled. The section itself does not so require, and such construction of it thwarts the Congressional purpose (1) to relieve the divorced husband of the tax upon income which he is required to pay his divorced wife as alimony or under an agreement in lieu thereof, and (2) to give the statute universal application, free from the vagaries of state law. It is well settled that the words of a statute must be given such meaning as will best implement its purpose. The interpretation of the section for which the Commissioner contends is designed to do that. So construed, the section requires no more than that the agreement be followed by a divorce. Several appellate courts have indicated that this is sufficient. Alternatively, the Commissioner contends that any evidence which shows a connection between the agreement and the divorce, including the fact that the parties contemplated a divorce, satisfies the requirement of such incidence.

B. Of course, if the incidence is established by the mere fact that the agreement is followed by a divorce, we have no problem here; for, under such interpretation of the section, the Tax Court's finding that there was no such incidence is clearly erroneous. The Tax Court's finding is, however, also clearly erroneous if the section is given a narrower interpretation; that is

to say, that it is held not necessarily to require that the parties entered into the agreement in anticipation or contemplation of divorce, or with the mutual understanding or agreement that one would follow. Here the incidence is established, among other things, by the fact that the agreement itself provides for its submission and approval by the divorce court in the event a divorce was obtained, and that it was accordingly submitted to the court and approved by it in the decree. Even so, the Tax Court's finding is also clearly erroneous under its own interpretation of the statute. The evidence establishes beyond the possibility of any question that, at least for six weeks prior to the execution of the agreement and while its terms had not been fully agreed upon by them, but only by their attorneys, both parties understood that the taxpayer would seek a divorce, as she did in fact. Thus, the evidence conclusively establishes that, at least during this period and thereafter until the divorce was obtained, both the taxpayer and her husband anticipated, contemplated, and mutually understood that a divorce would be obtained, if, indeed, they had not actually agreed thereto.

ARGUMENT

The June 15, 1938, Agreement Was a Written Instrument Incident to the Divorce Which the Taxpayer Obtained from Her Husband on August 25, 1938, and the Payments Made by Him to Her Thereafter During the Taxable Years 1945 and 1946, Pursuant to the Agreement, Were Includible in Her Gross Income in Those Years under Section 22 (k) of the Internal Revenue Code

It is the Commissioner's contention that the Tax Court erred in two respects, namely, first, in holding that the statute should be construed so as to require that

the agreement be a part of an integral plan of the spouses which included the obtaining of a divorce, and secondly, in holding that the evidence did not establish incidence between the agreement and the divorce. We consider first the holding of the Tax Court, which, as indicated, involves an erroneous construction of the statute, under our Subpoint A, and we shall then consider, under our Subpoint B (1), the sufficiency of the evidence to establish the incidence of the agreement to the divorce under our interpretation of the statute, and, under Subpoint B (2), the sufficiency of the evidence to establish such incidence, even under the Tax Court's interpretation thereof.

A. *Section 22(k) does not require that, in order for the agreement to be "incident" to the divorce, it be a part of an integral plan of the spouses which included the obtaining of the divorce*

So far as material here, Section 22(k) (Appendix, *infra*) may be skeletonized to show the five conditions to its application, i.e., to its requirement that the periodic payments therein specified made by a divorced husband to his divorced wife shall be included in her gross income, as follows:

> (k) *Alimony, Etc., Income.*—In the case of a wife [1] who is divorced * * * from her husband under a decree of divorce * * *, [2] periodic payments * * * [3] received subsequent to such decree [4] in discharge of * * * a legal obligation which, because of the marital * * * relationship, is * * * incurred by such husband * * * under a written agreement [5] incident to

> such divorce * * * shall be includible in the gross income of such wife, * * *.

It is conceded that the property settlement agreement entered into by the taxpayer and her husband on June 15, 1938, satisfies the first four requirements of the statute. In other words, the taxpayer was divorced from her husband under a decree of divorce and periodic payments were received by her from her divorced husband subsequent to such decree in discharge of his legal obligation which, because of the marital relationship, was incurred by him under a written instrument. Thus only the fifth requirement, that the agreement be incident to such divorce, is here in dispute.

The Tax Court held that the agreement was not incident to the divorce, which the taxpayer had obtained from her husband after the agreement was executed, solely because it concluded that, in order for the agreement to be such, it must have been a "part of an integral plan of the two spouses which included the obtaining of a divorce." (R. 107.) Thus, in applying this principle to the facts of the case as the Tax Court conceived them to be, it stated at the conclusion of its opinion that (R. 111):

> It had not been a foregone conclusion from the beginning that the wife would obtain a divorce, as was true in some of the cases cited above, and there was no mutual understanding between them on which he [the husband] could rely or from which the petitioner [the taxpayer] might feel any obligation, moral or otherwise, impelling her to seek a divorce. In short, the property agreement in this case was not a part of an integral plan, *which plan*

> *included an honest attempt on the part of the petitioner to obtain a divorce. It was not a part of the package of the divorce which was later obtained.* (Italics are supplied for emphasis.)

Otherwise stated, the Tax Court's theory of the statute—to which it here referred, as it had theretofore (R. 107), as the "package" theory—was that Section 22 (k) required, as a condition to the agreement's being held "incident" to the divorce, that it was entered into by the parties thereto in anticipation, or, as it has sometimes been stated, in contemplation of divorce. A perusal of the Tax Court's opinion makes it clear—a fact which we believe the taxpayer not only will not question, but, to the contrary, will readily concede—that this is the sole basis of the Tax Court's conclusion that the agreement here in question was not "incident" to the divorce, within the meaning of Section 22 (k).

Putting aside as irrelevant the Tax Court's evaluation of the evidence relating to such anticipation—which we shall, however, hereinafter under our Subpoint B-2 undertake to demonstrate to be clearly erroneous—a clear question of statutory construction is here presented, namely, whether the statute requires, as an absolute condition to the agreement's being incident to the divorce, that, at the time the agreement was conceived—and, in any event, thereafter until its terms were agreed upon—the parties anticipated, or contemplated, or understood, or agreed that a divorce would thereafter be obtained. And it is in the Tax Court's holding that such anticipation, contemplation, understanding, or agreement was an absolute prere-

quisite to the agreement's becoming incident to the divorce that the signal error of the Tax Court lies.

On the other hand, it is the Commissioner's contention that the incidence between the agreement and the divorce may be established not only by evidence of facts from which it appears that the parties intended that a divorce should be obtained, but, as here, from evidence of facts from which it appears that the agreement and divorce were so obviously related, both in point of time and circumstance, as, in combination, to effect a metamorphosis of the marital status of the parties into a divorce status, in the course of which, and as a direct result whereof, the husband's marital obligation, under applicable provisions of law, to maintain and support his wife, has been converted into a contractual one.

We are not unmindful of the fact that the statute may be given a much broader interpretation, as was suggested by the Court of Appeals in the First Circuit in the case of *Smith* v. *Commissioner,* decided December 10, 1951 (1952 C.C.H., par. 9104), where that court in this behalf said:

> Our conclusion is reached even on petitioner's assumption that the phrase in Section 22 (k) "under a written agreement incident to such divorce" means that the agreement must be "incident to a divorce decree". We need not take issue with the petitioner on this point. See *Mahana* v. *United States,* 88 Fed. Supp. 285 [50-1 USTC ¶9164], certiorari denied 339 U.S. 978. Whether that is the correct construction of Section 22 (k) we do not undertake to decide. It is appropriate to add, however, that in view of the congressional purpose in Section 22 (k) to secure tax uniformity irrespec-

> tive of variances in state laws, there is much to be said for reading the phrase "a written instrument incident to such divorce" as referring to the continuing status of the legal obligation to support the divorced spouse. See *Mertens, Law of Federal Income Taxation,* Vol. I, 1951 Cum. Pocket Supp. § 5.23 at pp. 107, 108.

See also *Mahana* v. *United States,* 88 F. Supp. 285 (C. Cls.), certiorari denied, 339 U.S. 978, where the court in this behalf said (p. 285):

> We have quoted the section, and it requires only that there be a divorce, a trust, and the receipt from the trust of income which would have been taxable to the husband if it had not been made taxable to the wife by the section. As the plaintiff properly concedes, these conditions are fulfilled as to the yield of the 1923 trust.

In this view, the fact alone that the divorce follows the agreement is sufficient to invoke the statute, at least presumptively. Under such interpretation, the statute would be given its broadest significance and application. It would completely implement the Congressional purpose to relieve the husband of the tax burden, which had theretofore been cast upon him under the federal taxing statute, despite the conversion of his marital obligation under applicable state law to maintain and support his wife into a contractual one, attendant upon a change of his marital status into a divorce status, as a result of a decree of divorce.

We believe such broader interpretation of the statute to be the correct one, because it is the only one which fully implements the Congressional purpose thereby to relieve the husband of the tax on income which he is

required, either by the decree of divorce or by the agreement, to pay to his divorced wife in satisfaction of his decretorially imposed or contractually assumed continuing obligation to maintain and support her. No reason is perceived or has been suggested why such relief should not be granted to him or why the burden of the tax upon such income should not be imposed upon her, because the incidence of the agreement to the divorce is established only by the concurrence of the agreement and the divorce. In any event, no reason is perceived or has been suggested why such relief should not be granted to him, or why the burden of the tax should not fall upon her, merely because the parties to the agreement did not from the outset anticipate, or contemplate, or mutually understand, or agree that a divorce should be obtained. Both the House and Senate Reports emphasize the fact that the purpose of the statute was to effect a change in the law as a result of which the husband was relieved of the burden of the tax theretofore imposed upon him in respect of income, which, after a divorce, was required by him to be devoted to the maintenance and support of his former wife, either under the terms of the decree of divorce or under an agreement entered into between him and his wife prior to the divorce. The House Report, H. Rep. No. 2333, 77th Cong., 2d Sess., p. 46 (1942-2 Cum. Bull. 372, 409-410), initially explains this change in the law in general terms, as follows:

> 5. Alimony and Separate Maintenance Payments
>
> The existing law does not tax alimony payments to the wife who receives them, nor does it allow the

husband to take any deduction on account of alimony payments made by him. He is fully taxable on his entire net income even though a large portion of his income goes to his wife as alimony or as separate maintenance payments. The increased surtax rates would intensify this hardship and in many cases the husband would not have sufficient income left after paying alimony to meet his income tax obligations.

The bill would correct this situation by taxing alimony and separate maintenance payments to the wife receiving them, and by relieving the husband from tax upon that portion of such payments which constitutes income to him under the present law. This treatment is provided only in cases of divorce or legal separation and applies only where the alimony or separate maintenance obligation is discharged in periodic payments. Moreover, the portion of such payments going to the support of minor children of the husband does not constitute income to the wife nor a deduction to the husband. The same is true with regard to payments in discharge of lump sum obligations, even though made in installments.

Where the husband's alimony or separate maintenance obligation is discharged through periodic payments attributable to property in trust, life insurance, annuity or endowment contracts, or to any other interest in property, the wife is required to include such payments in gross income, whether they come from income or capital. However, in the case of trusts created prior to the divorce or separation and not included thereto, the wife is required to include in gross income only the amount of the income of the trust which she is entitled to receive and which, under existing law, would be taxed to

the husband. The bill excludes such amount from the gross income of the husband.

Thereafter, in the course of the detailed discussion of the technical provisions of this bill, the same report says, pp. 71-72 (1942-2 Cum. Bull. 372, 427-428):

SECTION 117. ALIMONY AND SEPARATE MAINTENANCE PAYMENTS

This section adds new subsections to sections 22 and 23, amends sections 22 (b)(2), 25 (b)(2)(A), 401 (a)(2) and 3797 (a) of the Internal Revenue Code, and adds a new section to supplement E of chapter 1 in order to provide in certain cases a new income tax treatment for payments in the nature of or in lieu of alimony or an allowance for support as between divorced or legally separated spouses. These amendments are intended to treat such payments as income to the spouse actually receiving or actually entitled to receive them and to relieve the other spouse from the tax burden upon whatever part of the amount of such payments is under the present law includible in his gross income. In addition, the amended sections will produce uniformity in the treatment of amounts paid in the nature of or in lieu of alimony regardless of variance in the laws of different States concerning the existence and continuance of an obligation to pay alimony.

Section 22, relating to the definition of gross income, is amended by inserting at the end thereof a new subsection designated "(k)". This subsection applies only to a wife who is divorced or legally separated under a decree of divorce or of separate maintenance and to the husband from whom she is divorced or legally separated by such decree.

> Periodic payments, whether or not made at regular intervals, received by the wife subsequent to the decree, in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation are defined by section 22 (k) as gross income of the wife. This section applies only where the legal obligation being discharged arises out of the family or marital relationship in recognition of the general obligation to support, which is made specific by the instrument or decree.

The Senate Report, S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 83-84 (1942-2 Cum. Bull. 504, 568), makes the identical explanation.

In other words, in providing that the periodic payments in question must be "under a written instrument *incident* to such divorce" (italics supplied), Section 22(k) enjoins us merely to find a case where the agreement and the divorce have come together in such a way as, in combination, to settle the marital difficulties of the spouses—the divorce effecting a change in their marital status, and the agreement providing for a continuance of the support of the wife by the husband thereafter. This, we submit, is the plain, obvious and rational meaning of the statute, and therefore involves a correct definition of the word "incident" as used therein. Indeed, as indicated, it is the only construction of the section which fully implements the Congressional purpose to relieve the husband of the tax in respect of income which he is required to pay his di-

vorced wife and, at the same time, to cast the burden of such tax upon her.

Sight should never be lost of the fact the statute is remedial in its nature and that it affects both spouses. There is, therefore, no room, on the one hand, for a strict construction of the section, and no room, on the other, for a liberal construction thereof. *Burnet* v. *Guggenheim,* 288 U.S. 280, 286. We must ascertain what the construction of this section "fairly should be." *White* v. *United States,* 305 U.S. 281, 292. And since, as we have said, it is remedial in its nature, it must of necessity be construed so as to effectuate its purpose. See *Taylor* v. *United States,* 3 How. 197; *United States* v. *Stowell,* 133 U.S. 1; *United States* v. *Hodson,* 10 Wall. 395; *United States* v. *Graf Distilling Co.,* 208 U.S. 198; *Farmers' Loan & Trust Co.* v. *Bowers,* 68 F. 2d 916 (C.A. 2d), certiorari denied, 293 U.S. 565, 296 U.S. 649, 299 U.S. 582.

But the construction which the Tax Court placed upon Section 22(k) would lead to the very opposite result. This must be avoided if a reasonable application can be given it consonant with the legislative purpose. "The key to the proper interpretation of the act of congress is its policy and purpose." *Mercantile Bank* v. *New York,* 121 U.S. 138, 154.

Thus it is not required that the narrowest technical meaning be given the words of a statute—even those in a criminal statute—in disregard of their context and in frustration of the obvious legislative intent (*United States* v. *Corbett,* 215 U.S. 233, 242), or that the lawmakers' will be disregarded (*United States* v. *Giles,* 300 U.S. 41, 48). This principle has more recently

been applied by the Supreme Court in the case of *Board of Governors* v. *Agnew,* 329 U.S. 441, where, in order to implement the purpose of Congress to prevent directors and officers of banks who are members of the Federal Reserve System from being partners or employees of any partnership "primarily" engaged in the underwriting business, the Court held that the word "primarily," as used in the applicable section of the Banking Act, was not to be narrowly construed to mean "first," "chief," or "principal," but should be given its secondary and broader meaning of "essentially," "fundamentally," in the sense of "substantially." In this connection it is to be noted that, on the authority of that case, this Court, in *Rollingwood* v. *Commissioner,* 190 F. 2d 263, similarly construed the same word when used in a taxing statute, because such construction alone fully implemented the Congressional purpose. Of course, the Supreme Court has repeatedly held this principle applicable to taxing statutes. See *Helvering* v. *Stockholms &c. Bank,* 293 U.S. 84, 93-94, where, quoting *Sacramento Nav. Co.* v. *Salz,* 273 U.S. 326, 329, the Court said:

> The rule of strict construction is not violated by permitting the words of a statute to have their full meaning, or the more extended of two meanings. The words are not to be bent one way or the other, but to be taken in the sense which will best manifest the legislative intent.

Thus, in the *Stockholms &c. Bank* case, the Supreme Court held that, in order fully to implement the purpose of Congress, the word "person," as used in the

taxing Act there under consideration, included the United States.

The *Sacramento Nav. Co.* case, which, as stated, was cited by the Supreme Court in the *Stockholms &c. Bank* case, presented a question of statutory interpretation which is highly significant here. There the Supreme Court defined the word "vessel" in the phrase "vessel transporting merchandise," so as to include the combination of a vessel and a barge which the vessel was towing and which contained the merchandise that was being transported. The inclusion in the word "vessel" of the barge in combination with the vessel clearly indicates the length to which the Supreme Court considers the courts must go in order to implement the purpose of Congress. And in *United States* v. *Giles, supra,* the statute denounced as criminal one who with intent, etc., "makes a false entry." The Court held the statute broad enough to include the deliberate act of the defendant bank teller of withholding deposit slips for the purpose of concealing a shortage in his cash, from which a false entry by an innocent intermediary necessarily followed. For, as the Court said (pp. 48-49), it gave the words employed their "fair meaning"; that such holding was in accord with the evident intent of Congress, and to hold otherwise would "emasculate the statute—defeat the very end in view."

Even before the *Stockholm &c. Bank* case, the Supreme Court had repeatedly applied this principle in tax cases. Thus, in *Carbon Steel Co.* v. *Llewellyn,* 251 U.S. 501, 504, the Supreme Court construed the word "manufacturing" to include the activities of a corporation "furnishing" munitions to the British Govern-

ment, for whose manufacture the corporation had contracted. And, in *Worth Bros. Co.* v. *Lederer,* 251 U.S. 507, where the taxpayer contended that steel forgings were not "part of shells" in any practical or legal sense, because their development was so far short—80 percent—of the point where they could be related to or combined with any other component of the shell structure, the Court, in answer, said (p. 510):

> We reject the contention. Congress did not intend to subject its legislation to such artificialities and make it depend upon distinctions so refined as to make a part of a shell not the taxable "part" of the law.

Another example is in case of the "contemplation of death" section of the Code, which provides that there shall be included in the decedent's gross estate the value of all transfers *made by him* in contemplation of his death. Thus, in *City Bank Co.* v. *McGowan,* 323 U.S. 594, 599, the Supreme Court said that it seemed to it it was "sticking in the bark" to say that, in the circumstances, the transfers were not within the section because Congress did not add a phrase to the effect that where a state court made the transfer, acting in lieu of the incompetent owner, such transfer should be governed by the statute.

It is no answer to our contention, that the word "incident" as used in Section 22(k) should be construed to mean the coming together of the agreement and the divorce, to say that such interpretation of the section deprives the word "incident" of any meaning. There may possibly be agreements obligating the husband to

support his wife from whom he is separated which are so far removed in point of time and circumstance from a subsequent divorce as to appear to be unrelated thereto. And it may be that, in such a case, other evidence is necessary to establish the incidence between the agreement and the divorce, than that a divorce was obtained after the agreement was executed. But it will be time enough to determine whether, in such a situation, Section 22(k) requires more proof than that the agreement was followed by a divorce, to establish such "incidence." See *Old Colony Tr. Co.* v. *Commissioner,* 279 U.S. 716, 731. Moreover, while ordinarily an agreement made after divorce does not fall within the purview of the statute (see *Cox* v. *Commissioner,* 176 F. 2d 226 (C.A. 3d); *Commissioner* v. *Walsh,* 183 F. 2d 803 (C.A. D.C.)), this is not necessarily so. An agreement made after a divorce has been granted may be incident thereto no less than an agreement made prior thereto. But the incidence of such an agreement must, of necessity, be established by evidence other than its execution after the divorce. For one thing, the divorce may terminate the husband's obligation to support his divorced wife. In such event, the agreement would be purely voluntary, and the payments made thereunder would be regarded as mere gifts. Or the question may arise as to whether the agreement is supplemental to an original agreement made prior to divorce, which is incidental thereto, or whether it is a substitute for such an agreement. See the decision of this Court in *Fairbanks* v. *Commissioner,* 191 F. 2d 680, as well as the First Circuit's decision in *Smith* v. *Commissioner,*

supra; and cf. *Murray* v. *Commissioner,* 174 F. 2d 816 (C.A. 2d).

If the foregoing explanation given of Section 22 (k) in the Congressional reports were the only explanation thereof, we would unhesitatingly say that nothing more is required to effect an incidence of the agreement to the divorce than that the agreement was followed by the divorce.

However, there is some indication in both reports, albeit unsatisfactory and inconclusive, that Congress did not intend to make such incidence the only condition to the application of the statute. This indication lies in the fact that both reports go on to state (H. Rep. No. 2333, *supra,* p. 72 (1942-2 Cum. Bull. 372, 428), and S. Rep. No. 1631, *supra,* p. 84 (1942-2 Cum. Bull. 504, 568)):

> This section does not apply to that part of any periodic payment attributable to any interest in the property so transferred, which interest originally belonged to the wife, unless she received it from her husband in contemplation of or as an incident to the divorce or separation without adequate and full consideration in money or money's worth, other than the release of the husband or his property from marital obligations.

Reference here is to that portion of Section 22 (k) which refers to periodic payments made by the divorced husband to his divorced wife indirectly in the discharge of his contractual obligation to maintain and support her, that is to say, to periodic payments which are "attributable to property transferred (in trust or otherwise)" in discharge of such obligation.

It will be noted that such an agreement is said to fall within the ambit of the statute either if it is made "in contemplation of" divorce, or if it is "an incident to the divorce." On the other hand, as we have already pointed out, the statute itself provides only that such an agreement must be "incident to such divorce"; it does not provide, in the alternative, that it may be made only "in contemplation" thereof.

Thus, the very best that may be said of the committees' explanation of the purpose of this portion of the section is that the agreement must be incident to the divorce is that Congress intended such contemplation to suffice to establish the incidence where it is not otherwise shown.

But it does not follow that, because incidence between the agreement and the divorce may be established by proof that a divorce was anticipated, such proof is indispensable to establish it. Thus, while in the case of *Izrastzoff* v. *Commissioner,* decided January 8, 1952 (1952 C.C.H., par. 9134), the Second Circuit rejected the taxpayer's contention that the Tax Court's findings were clearly erroneous, that the parties there had contemplated divorce when the agreement was executed, and for that reason sustained the Tax Court's decision, the court went on to say:

> Moreover, we are disposed to accept the [Government's] argument that her intent is not the determinative factor. Even if she were completely immune from thoughts of an outcome which a large part of society accepts as the normal denouement of marital disruption, the evidence would still support the conclusion that the agreement

was "incident to" the divorce. There is no requirement in § 22(k) of positive proof that both parties jointly and positively anticipated legal divorce or separation at the moment they signed the agreement. As illustrated by this case, such a construction would force the Commissioner to rely on an interested party's recollection of her own state of mind of some thirty years past concerning negotiations in which she played no real part. See *Powell* v. *C.I.R.,* 1 Cir. 94 F. 2d 483, 486. It would make meaningless the concrete evidence of events and the agreement itself, which are far from mute in pointing to the connection between agreement and subsequent legal separation or divorce. Legislative emphasis upon a mutually coexistent intent for divorce is not to be assumed in the absence of an expressed requirement, particularly in view of the well understood danger that an appearance of collusion between the parties might prevent divorce in many jurisdictions. Such legislative history as is available stresses only the manifest fairness of charge to the wife and deduction by the husband of payments not only for alimony, but also for separate maintenance provisions "in the nature of or in lieu of alimony or an allowance for support." House Ways and Means Committee, 77th Cong., 2d Sess., Rep. No. 2333, pp. 46, 71, 72; Senate Finance Committee, 77th Cong., 2d Sess., Rep. No. 1631, pp. 83-85. Hence *Lerner* v. *C.I.R.,* 15 T.C. 379, 386, relied on by petitioner, goes overfar in intimating a requirement of anticipation of divorce by both parties at the time, although the decision is quite unexceptional, since there divorce was only a faint and undiscussed possibility and the agreement actually looked to the support of the children.

Here the Tax Court's conclusion of law is supported by both the showing of the parties' states of mind and the events and agreement itself. We need not attempt any final definition of "incident to," a phrase which courts have found difficulty in clarifying.[3] For here the evidence, viewed either together or apart from that portion objected to by petitioner, seems quite clear that the agreement was "incident to" the divorce, whether or not both parties were actively planning such action at the moment they executed it. The proximity in time of the settlement and the institution of proceedings, Reid's efforts to collect evidence of his estranged wife's infidelities unexplainable save in the light of plans for legal action, the wife's relationship with the future corespondent, and the provisions for divorce incorporated in the agreement—all require the inference that execution of the agreement was based upon the contemplation of divorce as a real possibility and an intent that this agreement should become part of such an ultimate settlement between the parties. See *C.I.R.* v. *Murray,* 2 Cir., 174 F. 2d 816; *Blum* v. *C.I.R.,* 177 F. 2d 670.

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[3] Thus, "incident to" has been paraphrased as "in connection with," *Tuckie G. Hesse,* 7 T.C. 700, 704, *Robert Wood Johnson,* 10 T.C. 647, 652; "part of the package of the divorce," *Cox* v. *C.I.R.,* 3 Cir., 176 F. 2d 226, 229, *Lerner* v. *C.I.R.,* 15 T.C. 379, 386; "contemplated at the time of executing the agreement," *George T. Brady,* 10 T.C. 1192, 1197; "usually or naturally and inseparably depends upon, appertains to, or follows," Ballantine, Law Dictionary 623, 1930 Ed. We need hardly add that the result here is in harmony with these expressions.

It is thus seen that at least two circuits, the First and Second, as well as the Court of Claims, have regarded it as unnecessary to the establishment of such incidence that a divorce be contemplated at the time the agreement was first conceived, or at the time it was consummated, or that, as the Tax Court in the instant case said, the agreement must be a "part of an integral plan of the two spouses which included the obtaining of a divorce." (R. 107, 111.) See also in this connection the case of *Smith* v. *Commissioner, supra,* where the Court of Appeals for the First Circuit in this behalf said:

> The petitioner cannot deny that the 1937 agreement was incident to the April 18, 1938 divorce decree because it was specifically incorporated in that decree.

In other words, the First Circuit regarded it as sufficient to establish such incidence that the agreement was specifically included in the decree.

Moreover, the additional purpose of Congress in enacting Section 22 (k), namely to establish a uniform basis of taxation freed from the impact of vagaries of state law, is obviously subserved by incidence of the agreement to the divorce, however it may be established, and does not require its establishment by proof that the parties anticipated the divorce at the time the agreement was entered into. A requirement that the incidence of the agreement to the divorce be established by proof that the parties anticipated the divorce would also unnecessarily restrict the purpose of Congress to give the section universal application, regard-

less of whether the courts in a given state could or could not by decree of divorce provide for the maintenance and support of the divorced wife thereafter.

The reliance of the Tax Court upon its own decisions, and particularly upon its decision in the case of *Lerner* v. *Commissioner,* 15 T.C. 379, appears to be misplaced. That case is now pending on the taxpayer's appeal in the Second Circuit, and with respect thereto that court has already in *Izrastzoff* v. *Commissioner, supra,* said, in the course of the portion of the opinion already quoted, that the Tax Court's decision therein goes overfar in indicating a requirement of anticipation of divorce by both parties at the time.

It would seem clear, therefore, that the Tax Court clearly erred in so interpreting Section 22 (k) as to require that the incidence of the June 15, 1950, agreement to the divorce could be established only by facts which showed that it was an integral part of a plan of the two spouses which included the obtaining of the divorce.

B. *The Tax Court erred in holding that the evidence did not establish incidence between the agreement and the divorce*

1. *The evidence conclusively establishes such incidence under the Commissioner's interpretation of Section 22 (k)*

Of course, if the incidence of the agreement to the divorce results from the mere fact that the divorce follows the agreement, we have no problem at all, for then it could not be denied that the statutory requirement of incidence is satisfied here. Such requirement

is, however, satisfied in this case, even if the Court regards such construction of the statute too broad, but concludes that reference in the decree to the agreement to say nothing of reference in the agreement to the decree, establishes the incidence. We do not see how it can be otherwise, for such reference obviously satisfies the "package" theory, excepting only in so far as it is thought, that, in addition, anticipation, or contemplation, or mutual understanding or agreement that a divorce would ensue is an indispensable element of proof to establish the incidence.

But, as indicated, Section 22 (k) does not specifically provide the character of proof required to establish such incidence; and, as we have seen, the Second Circuit has expressly said in the *Izrastzoff* case, *supra,* that there is no requirement in the section of positive proof that both parties jointly and positively anticipated legal divorce or separation at the moment (and, consequently, of course, at any time before) they signed the agreement. And, as we have also shown, such requirement would not only not implement the purposes which Congress intended to subserve in enacting the statute, but would so restrict its application as to thwart them to a large degree.

We have no doubt, therefore, that the incidence of the agreement to the divorce is here established not only by the fact that the agreement refers to the contingency of the divorce and requires its submission to the court for its approval in the divorce proceeding, but particularly by the fact that it was approved by the court in the proceeding.

But we are not satisfied to let the matter rest there. Loath as we are ever to challenge a finding of the Tax Court on the ground that it is clearly erroneous, we think the evidence in this case clearly shows that the taxpayer had decided to obtain a divorce more than six weeks prior to the time that the agreement was executed and that, at least during that period, it was mutually understood between the parties, acting through their respective attorneys, that a divorce was to be obtained. And that, we submit, should satisfy any possible requirement that they anticipated, or contemplated, or mutually understood, or agreed that a divorce was to be obtained.

We turn then to a discussion of this phase of the case.

2. *The Tax Court's finding that the property agreement was not a part of an integral plan, which included an honest attempt on the part of the taxpayer to obtain a divorce, is clearly erroneous*

At the outset, we are faced with the problem of determining just what the Tax Court meant when it said that "the property agreement in this case was not a part of an integral plan, which plan included an honest attempt on the part of the petitioner [taxpayer] to obtain a divorce." (R. 111.)

Assuredly, the Tax Court could not thereby have meant that the plan to obtain a divorce must have antedated the inception of the agreement. And, if the Tax Court did not mean to go that far, it might be thought that it regarded it as sufficient that the plan for divorce was conceived at any time during the

period the agreement was being formulated. But that clearly was also not the Tax Court's view.

What the Tax Court apparently meant was that the plan for divorce must have been mutually agreed upon during the period that plans for the separation were being formulated but before the terms of the agreement had been finally decided upon, particularly the amount of the periodic payments which the taxpayer was to receive from her husband not only prior, but also subsequent, to the divorce. Even then, the finding is that the attorneys for the parties had agreed upon the terms prior to March, 1937 (R. 102), but that the agreement itself with complete schedules attached had been drawn up only "by the latter part of May 1937," whereas the taxpayer had decided to obtain a divorce as early as the latter part of April, 1937, and had then so advised her attorney, Philbrick McCoy, who had in turn advised her husband's attorney, Bernard Potter, of that. (R. 103.) Not only that, but Potter had written Miller as early as May 3, 1937, indicating that the agreement was still in a formulative stage (Ex. D, R. 87-88) and that (R. 88)—

> While I was talking with him [the taxpayer's attorney] over the phone he asked if it was likely that you would be in Los Angeles around the time the settlement was finally agreed upon as it would expedite matters with regard to the divorce; that is, if you were here you could be served with the papers and the matter disposed of quickly. I told him that I did not know positively whether you would be here or not, but I thought some mention had been made in one of your letters that there was such a possibility.

And again, on the 17th of May, 1937, Potter wrote Miller another letter (Ex. E, R. 89-90), wherein he said, among other things, as follows (R. 90):

> After you are served with a Summons and Complaint, it requires ten days before default can be entered and usually it requires three or four days after that before the matter can be heard and the interlocutory decree entered.

Of course, the agreement was not signed until June 15, 1937, and Miller testified both on direct (R. 95-96) and on cross-examination (R. 96-99) that he would not have signed it except for his understanding that a divorce would be obtained. Now Potter had testified on direct examination as follows (R. 81-82):

> By Mr. Flynn:
>
> Q. Did you have any discussion with Mr. McCoy regarding whether or not the divorce would be contingent upon entering into the agreement?
>
> A. I had many talks with Mr. McCoy about the whole matter and also about the question of the divorce. It was stated to me—stated to him by me that Dr. Miller would not consider entering into any property settlement whatsoever unless a divorce was procured, and that of course, it could not be procured by him, but by her. In fact, I have forgotten the date now, but the letter here will disclose that—that prior to the 15th day of June when this property settlement was executed and the decree of divorce or the divorce was filed on the 22nd or 23rd of the same month, along prior to that, and arrangement was made by which Mr. McCoy was to be paid for securing this

divorce. I think $250.00 was paid down to him by Dr. Miller through me.

I don't know what that letter states. He calls attention to the fact—Mr. McCoy does—that there is due him $250.00 for the divorce.

The whole property settlement was predicated upon the understanding that a divorce would be filed, a divorce suit would be filed.

Q. That was your understanding at that time?

A. It is not my understanding, my knowledge.

As against that, McCoy testified at great length that the divorce was not considered during the formulation of the agreement, but only after all of its terms had been agreed upon; that, in fact, the taxpayer did not want a divorce at first, changing her mind only in the latter part of April, 1937 (R. 19-21); his direct examination being concluded with the following summary (R. 23):

Q. As I understand your testimony, all of the financial terms of the property settlement agreement were agreed upon between you and counsel for Mr. Miller back in January or February of 1937, is that right?

A. That is right.

Q. And nothing was ever said to you by Mrs. Miller about a divorce until some time in the latter part of April or May of 1937?

A. Thereabouts.

Q. And neither Dr. Miller nor any of his attorneys ever indicated to you that there was any connection between the property settlement agreement and the divorce action?

A. None whatsoever.

And, on cross-examination, he testified (R. 25):

> Q. Just prior to the filing of the divorce complaint, isn't it true that the agreement and the divorce were considered together in correspondence principally?
>
> A. Quite likely, because by this time, if I remember correctly, I had informed Dr. Miller's attorney—I had referred in a letter as early as sometime in the latter part of April, that a divorce was in the wind, but by this time the property settlement was coming up to an end, and Mrs. Miller had advised me, as I just indicated, that she had concluded to get a divorce. Bernard Potter and I would stand on the street corner at Fifth and Spring any number of times during the lunch hour when we would meet and chew the fat about it, and then we would reduce the matters to correspondence. I don't doubt but that many times I referred to a divorce in the same letter that I was writing about the property settlement. I didn't keep two separate files in this respect.
>
> Q. Weren't you at one time advised by Attorney Potter for Dr. Miller that unless Mrs. Miller signed the agreement that Dr. Miller would not go through with the divorce as planned?
>
> A. That Dr. Miller wouldn't go through with the divorce? Dr. Miller had nothing to do with it. If he wanted to answer it and contest it, he might, but I don't recall any such conversation as that.

McCoy's testimony that he and Miller's attorney had agreed upon all of the terms of the agreement in February, or March, 1937, was obviously the basis of the Tax Court's finding that the attorneys for the parties had agreed on such terms prior to March, 1937. But

this does not explain why the terms of the agreement were not reduced to writing until the latter part of May. (R. 103.) That is explained in this record only by the fact that the correspondence between Miller and his attorney plainly indicates that the final terms of the settlement had not been agreed to by the parties, because this correspondence discloses that Miller did not indicate his assent thereto until sometime after May 1, 1937, that is, not until after the taxpayer had advised her attorney that she intended to get a divorce. (Ex. D, R. 87-88.)

It is, therefore, an inescapable inference, we submit —that is to say, one which the evidence compels—that, between the time the taxpayer told her attorney she had decided to get a divorce in the latter part of April, 1937, and the time the agreement was signed on June 15, 1937, the terms of the settlement agreement had not finally been agreed upon between the parties themselves, and further that during that period both the taxpayer and her husband anticipated, or contemplated, or mutually understood that there would be a divorce, if, indeed, they had not actually reached an agreement with respect thereto.

Nor is there anything in the taxpayer's testimony which in any way impairs this conclusion. Her testimony was that she had had no discussion with her husband personally about a divorce (R. 65); that, at the time the agreement was being negotiated, McCoy did not tell her that her husband wanted one (R. 67); that it was, however, before the agreement was signed, although not long before then, that she talked to McCoy about getting a divorce; and that, although she could

not fix the date, it was after the property settlement had been agreed upon (R. 67-68). She also summarized her direct testimony at its end, as follows (R. 68):

> Q. And so far as you were concerned then I get it from your testimony that you and Dr. Miller never discussed the subject of a divorce? In fact, you never heard from him and that you were never advised by Mr. McCoy that Dr. Miller's attorneys had discussed the matter of divorce with him?
> A. No.

It should be added that the taxpayer's cross-examination developed nothing beyond the fact that she could not fix the date of any occurrence during this period. (R. 68-72.)

Thus, obviously, she understood there was going to be a divorce, as did Miller. And, as obviously, it was their mutual—or shall we say, reciprocal—understanding with regard thereto which caused them to insert the provision in the agreement requiring its submission to the divorce court "in the event that either party hereto shall obtain a divorce from the other." (R. 104.) Moreover, the ink was hardly dry upon the agreement before the taxpayer entered suit for divorce. In these circumstances, we submit, there was not the slightest justification for the Tax Court's disregarding or discrediting the testimony of either Miller or his attorney, as it said it had (R. 110), to the effect that, so far as he was concerned, the divorce was a condition to the execution of the agreement, if not from its inception, then thereafter during its formulation, and certainly before it was executed. It is elemental that the trier of the facts ought not to be heard to say that he believes, when he should

not have believed, or that he disbelieves when he should not have disbelieved. And, yet, that is precisely what the Tax Court did.

The thought that the taxpayer was "free to make a new decision," presumably before the agreement was signed, as the Tax Court said she was (R. 110), is irrelevant. If she had changed her mind and had so advised her husband, he would not likely have executed the agreement. Nor is it relevant, if true, as the Tax Court further said it was, that the property settlement was separate in the taxpayer's mind from any action she might susequently take in regard to the divorce. (R. 110.) Of course, even after she had executed the property agreement, she could have gone back on her agreement to seek a divorce, and her husband would have been without a remedy. But she did not do that. Why didn't she, if she did not at any time want a divorce? Obviously, because she had advised her husband through her attorney that she would get one, and could not thereafter in good conscience—or shall we say, in good grace—have refused to institute the action. Again, as we have seen, it is irrelevant, if true, as the Tax Court also said it was, that she sought the property settlement for its own benefits when she had no thought of divorce; that she sought it because she wanted a settlement of her property rights and funds on which to live. (R. 110-111.) In any event, the question is not what she sought originally, but what she agreed to eventually. Nor is there any basis for the Tax Court's statement that Miller was aware of this, but at the time he signed the agreement was only hoping that she would get a divorce. (R. 111.) To the contrary, the record

clearly shows that he came back to California, not only to execute the agreement, but at the same time to be served with summons in the divorce action. (Ex. E, R. 89-90.) Moreover, sight should not be lost of the fact that the agreement itself provided for its submission to the divorce court in the event either party should obtain a divorce. Why should this have been put in the agreement, if not because the taxpayer had assured him (through her attorney) that she would get a divorce and the property agreement was entered into by both with a view to fixing his liability to maintain and support her after the decree had been obtained? We submit that is just what happened. It should be remembered that McCoy had testified to the effect that, from the time he had advised Miller's attorney of the taxpayer's decision to obtain a divorce, the property agreement and the prospective divorce were considered together; that he and Potter had stood on the street corner and talked about both "any number of times"; that they would then reduce their discussion to correspondence, and that he had no doubt many times referred to the divorce in the same letter that he was writing about the property settlement. (R. 25.)

The factual conclusion of the Tax Court—insofar as it is such—is, therefore, clearly erroneous, and should not be permitted to stand, that the property settlement was not a part of an integral plan of the taxpayer and her husband, which included the obtaining of a divorce.

CONCLUSION

For the reasons stated, the decision of the Tax Court should be reversed.

Respectfully submitted,

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JANUARY, 1952.

APPENDIX

Internal Revenue Code:

SEC. 22. GROSS INCOME.

* * * * *

(k) [as added by Sec. 120(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Alimony, Etc., Income.*—In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband. This subsection shall not apply to that part of any such periodic payment which the terms of the decree or written instrument fix, in terms of an amount of money or a portion of the payment, as a sum which is payable for the support of minor children of such husband. In case any such periodic payment is less than the amount specified in the decree or written instrument, for the purpose of applying the preceding sentence, such payment, to the extent of such sum payable for such support, shall be considered a payment for such support. Installment payments discharging a part of an obligation the principal sum of which is, in terms of money

or property, specified in the decree or instrument shall not be considered periodic payments for the purposes of this subsection; except that an installment payment shall be considered a periodic payment for the purposes of this subsection if such principal sum, by terms of the decree or instrument, may be or is to be paid within a period ending more than 10 years from the date of such decree or instrument, but only to the extent that such installment payment for the taxable year of the wife (or if more than one such installment payment for such taxable year is received during such taxable year, the aggregate of such installment payments) does not exceed 10 per centum of such principal sum. For the purposes of the preceding sentence, the portion of a payment of the principal sum which is allocable to a period after the taxable year of the wife in which it is received shall be considered an installment payment for the taxable year in which it is received. (In cases where such periodic payments are attributable to property of an estate or property held in trust, see section 171(b).

(26 U.S.C. 1946 ed., Sec. 22.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.22(k)-(1). *Alimony and Separate Maintenance Payments—Income to Former Wife.*—(a) *In general.*—Section 22(k) provides rules for treatment in certain cases of payments in the nature of or in lieu of alimony or an allowance for support as between spouses who are divorced or legally separated under a court order or decree. For convenience, the payee spouse will hereafter in this section of the regulations be referred to as the "wife" and the spouse from whom she is di-

vorced or legally separated as the "husband". See Section 3797(a) (17).

In general, section 22(k) requires the inclusion in the gross income of the wife of periodic payments (whether or not made at regular intervals) received by her after the decree of divorce or of separate maintenance. Such periodic payments may be received from either of the two following sources:

(1) In discharge of a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by the husband, or

(2) Attributable to property transferred (in trust or otherwise) in discharge of a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by the husband.

The obligation of the husband must be imposed upon him or assumed by him (or made specific) under either of the following:

(1) A court order or decree divorcing or legally separating the husband and wife, or

(2) A written instrument incident to such divorce or legal separation.

The periodic payments received by the wife attributable to property so transferred and includible in her income are not to be included in the gross income of the husband. See also section 29.171-1 in cases where such periodic payments are attributable to property held in trust.

The purpose and effect of section 22(k) may be illustrated, in general, by the following examples, in which it is assumed that the husband and wife make their income tax return on the calendar year basis:

Example (1). W sues H for divorce in 1942. The court awards W temporary alimony of $25 a week pending the final decree. On September 1, 1942, the court grants W a divorce and awards her $200 a month permanent alimony. No part of the $25 a week temporary alimony received prior to the decree is includible in W's income under section 22(k), but the $200 a month received during the balance of 1942 by W is includible in her income for 1942. Under section 23(u), H is entitled to deduct such $200 payments from his income.

Example (2). W files suit for divorce from H. In consideration of W's promise to relinquish all marital rights and not to make public H's financial affairs, H makes a legally binding promise in writing to W to pay to her $200 a month if a final decree of divorce is granted without any provision for alimony. Accordingly, W does not request alimony and no provision for alimony is made under a final decree of divorce entered prior to 1942. During 1942, H pays W $200 a month, pursuant to the promise. The $2,400 thus received by W is includible in her gross income under the provisions of section 22(k). Under section 23(u), H is entitled to a deduction of $2,400 from his gross income.

Example (3). H and W enter into an antenuptial agreement, under which, in consideration of W's relinquishment of all marital rights (including dower) in H's property, and, in order to provide for W's support and household expenses, H promises to pay W $200 a month for her life. Ten years after their marriage, W sues H for divorce but does not ask for or obtain alimony because of the provision already made for her support in the

antenuptial agreement. Likewise, the divorce decree is silent as to such agreement and H's obligation to support W. Section 22(k) does not apply to such a case. If, however, the decree were modified so as to refer to the antenuptial agreement, or if, at the time of the divorce, reference had been made to the antenuptial agreement in the court's decree or in a written instrument incident to the divorce, section 22(k) would require the inclusion of the payments received by W after the decree in her income for taxable years beginning after December 31, 1941. (As to including such payments in the wife's income, if made by a trust created under the antenuptial agreement, regardless of whether referred to in the decree or a later instrument, see section 29.171-1.)

Section 22(k) applies only where the legal obligation being discharged arises out of the family or marital relationship in recognition of the general obligation to support, which is made specific by the instrument or decree. Thus, section 22(k) does not apply to that part of any periodic payment which is attributable to the repayment by the husband of, for example, a *bona fide* loan previously made to him by the wife, the satisfaction of which is specified in the divorce decree as a part of the general settlement between the husband and wife.

Periodic payments are includible in the wife's income under section 22(k) only for the taxable year in which received by her. As to such amounts, the wife is to be treated as if she makes her income tax returns on the cash receipts and disbursement basis, regardless of whether she normally makes such returns on the accrual basis. * * *

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